SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1014

EDDIE J. VIATOR,

Petitioner,

vs.

A. H. STONE, CHAIRMAN, STATE TAX COMMISSION, ET AL.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

The Opinions of the Court Below

No opinion was rendered by the District Court of the United States for the Southern District of Mississippi. Order of the District Court, sustaining Motion to Dismiss is shown at R. 76, 77. The opinion of the Circuit Court of Appeals for the Fifth Circuit is reported in (not yet published) — F. 2d., pp. ——. Rehearing was denied January 26, 1945. The opinion of the Circuit Court of Appeals is copied at R. 103-4. Order denying rehearing is copied at R. 110.

II

Jurisdiction

1. Judicial Code, Section 240, amended; Title 28 U. S. C. A. 347(a) as amended by the Act of February 13, 1925, 43 Stats. 928.

2. The date of the decree to be reviewed is June 10, 1944 (District Court) (R. 76, 77). The date of the Decree to be reviewed is December 9, 1944 (Circuit Court of Appeals) (R. 104). Petition for rehearing filed was denied January 26, 1945 (R. 110). Application for Stay of Mandate was filed and granted, and Petitioner given thirty days in which to apply for Writ of Certiorari.

3. The opinion and final decree of the United States Circuit Court of Appeals for the Fifth Circuit is in conflict with the decisions of other Circuit Courts of Appeals on the same matter, and the Circuit Court of Appeal for the Fifth Circuit has decided an important question of local law in a way in conflict, or probably so, with applicable local decisions, and has decided an important question of general law in a way, or probably so, untenable, or in conflict with the weight of authority. An important question is involved in this case which it is in the public interest to have settled by the Supreme Court of the United States as the Court of last resort, and in order to make the decision of the Circuit Court of Appeals for the Fifth Circuit conform to, and be in harmony with, decisions of other Circuit Courts of Appeals, the Supreme Court of the United States, and the Supreme Court of Mississippi, and, second, to bring up this case which involves questions of importance which it is in the public interest to have settled by the Supreme Court of the United States as the court of last resort, Writ of Certiorari should be granted. Sworn Bill of Complaint filed herein factually shows that petitioner was proceeded against in an unconstitutional and illegal manner; that no fair and reasonable hearing was afforded petitioner by state officers; that state statutes complained of, as construed and applied against petitioner are unconstitutional and violate the Fourteenth Amendment to the Constitution of the United States and Section Fourteen of the Constitution

of Mississippi. As shown by sworn bill of complaint filed herein, admitted by Motion to Dismiss, petitioner does not have the right under state practice to an independent investigation of the law and the facts on certiorari or by bill for injunction. State statutes deny injunctive relief. The State courts require taxpayer to pay the tax and sue to recover it. Taxpayer cannot recover any interest on taxes he might pay, if he had the money and could pay said taxes, which he shows by sworn bill admitted by Motion to Dismiss, that he cannot do, because he does not have the money. The state court holds that interest cannot be recovered where the rate is not fixed by statute. The Sales tax statutes of Mississippi do not provide the rate and the State court holds that recourse cannot be had to the general interest of the state because the State and its political subdivisions are not mentioned in the general interest statute. Petitioner factually shows by sworn bill of complaint, admitted by Motion to Dismiss, that state officers refused to investigate the matter fully, as required by state statutes, and refused to make a report in writing setting forth a review of the cause and the essential facts of the matter, required by state statutes.

4. The questions raised in this court on this record are: 1. The right of petitioner to enjoin the action of state officers in the federal court on the ground that the statutes of the state, as construed and applied against him, are unconstitutional, and violate the Fourteenth Amendment of the Constitution of the United States and Section Fourteen of the Constitution of Mississippi; that the orders and judgment made and rendered against him were not made and rendered after reasonable notice and hearing; that he does not have an adequate remedy at law or in equity in the state courts, because he cannot have an independent investigation of the law and the facts on certiorari or by Bill for injunc-

tion, he cannot pay the tax, because he does not have the money, and cannot recover any interest on taxes he might eventually pay the state by levy, on, and sale of, his property. 2. Whether petitioner has, as held by the Circuit Court of Appeals for the Fifth Circuit, the duty and the right to pay the tax and then sue in the District Court of the United States for its recovery.

Cases believed to sustain the jurisdiction of this court to review this case on Writ of Certiorari as required by Rule 12, Paragraph 1, are the following:

Green v. *L. & I. R. Co.*, 244 U. S. 799;
Davis v. *Wallace*, 257 U. S. 478, 482;
Southern Railway Co. v. *Watts*, 260 U. S. 519;
Magnum Import Co. v. *Coty*, 262 U. S. 159;
Atlantic Coast Line R. Co. v. *Doughton, et al.*, 262 U. S. 413.

III

Statement of the Case

Introductory

Petitioner appealed from the order of the District court of the United States for the Southern District of Mississippi, sustaining Motion and dismissing his Bill of Complaint for injunction at his costs. Petitioner filed his Bill in the District court of the United States for the Southern District of Mississippi, to enjoin the action and orders and judgments of state administrative officers, under Section 266 of the Judicial Code, as amended, after exhausting every administrative remedy in the state court, by which sworn bill of complaint he shows that he was proceeded against contrary to the reasons given in Registered Demand for additional sales tax, without jurisdiction, without evidence, contrary to the indisputable character of the evidence of-

fered by him, and arbitrarily; petitioner showed that he kept adequate records and preserved invoices for two years; he showed that he paid all sales tax due the State of Mississipi, and does not now owe the sales tax liability adjudged against him by state officers; he showed that he was refused a hearing, and a report in writing setting forth a review of the cause and the essential facts of the matter, required by state statutes. Petitioner showed that his administrative appeals were a farce and a sham; that the administrative officers were not required to do their duty under the state statutes; that they acted ultra vires. Petitioner shows by sworn bill of complaint, admitted by motion to dismiss, that the courts of Mississippi refused to permit an independent investigation of the law and facts of the case on certiorari, that state statutes deny injunctive relief in the state courts, and that the state court held the decision in the certiorari case was the law of the case, notwithstanding the decision in such certiorari case shows that the court would not, and did not, grant petitioner on the merits of his complaint; that under the law of Mississippi no right to an independent investigation of the law and the facts of the case may be had. Petitioner showed by sworn Bill of Complaint, admitted by Motion to Dismiss, that he could not pay the challenged state tax because he does not have the money, and could not recover any interest on any state taxes he might eventually pay, by levy on, and sale of, his property, because state statutes do not fix the rate of interest to be paid on recovery of any sales tax paid and recovered by suit, and the state court holds that interest may not be recovered where the rate is not fixed by statute; that recourse cannot be had to the general interest statute of the state because the state and its political subdivisions are not mentioned therein. The District Court sustained Motion to Dismiss Petitioner's Bill at his costs, and held that petitioner had an adequate remedy in the state court; that

the law of the case had been settled by the Supreme Court of Mississippi and jurisdiction denied by the Supreme Court of the United States. The Circuit Court of Appeals for the Fifth Circuit held that the District Court was in error in dismissing petitioner's bill on the ground that he had an adequate remedy in the State Court, but said that petitioner could pay the tax and sue in the District Court of the United States for its recovery, and held that such was an adequate remedy. The Circuit Court of Appeals affirmed the District Court.

IV

Statement of Facts

On December 8, 1939, respondents gave notice to petitioner by Registered mail of their demand for additional sales tax. R. 34. Said Registered demand for additional sales tax asserted that said additional assessments were made against taxpayer for the reason that the records kept by him were inadequate to determine the amount of tax for which he was theretofore liable (R. 34, 35). Petitioner immediately petitioned for a hearing as provided by Section 6 of Chapter 113, General Laws of Mississippi of 1938, which requires respondents to investigate the matter fully before proceeding further. Respondents refused to investigate the matter fully and said they would not investigate it fully, or at all (R. 35). Following said manifestly unfair and inadequate hearing, without evidence and contrary to the indisputable character of the evidence offered by petitioner, he appealed to the Excise Commissioner as provided by Section 1, Chapter 150 of the General Laws of Mississippi of 1938 (R. 35, 36, 37). The Excise Commissioner again refused to investigate the matter fully, and failed and refused to submit a report in writing, setting forth a review of the cause and the essential facts of the matter as required by said section 1, Chapter 150, Laws of 1938. Instead he

wrote a letter reciting that it was his opinion, concurred in by other agents and employees of respondents, that the additional tax assessments should remain as originally assessed. R. 37, 38. Petitioner next appealed to the Whole Commission, as required by state statutes. (Section 1, Chapter 150, Laws of 1938.) He objected to the action of the Chairman of the Commission and the Excise Commissioner, proceeding against him without evidence, and without a report in writing setting forth a review of the cause and the essential facts of the matter, but his objections went for naught. R. 38. Petitioner was advised that the assessments for additional sales tax had been affirmed against him by respondents and there was no remedy available to him except to pay the tax and file suit in the Circuit Court of the County of his residence for its recovery, if he regarded the tax as having been erroneously collected. R. 39. Because Section 73, Mississippi Code of 1930, provides that orders of tribunals inferior to the Circuit Courts of Mississippi may be reviewed by certiorari in the Circuit Courts, petitioner filed his petition for writ of certiorari in the Circuit Court of Hinds County, Mississippi, and assigned the reasons for allowance of the writ of certiorari shown at R. pages 41, 42, 43, 44, 45 and 46. The Circuit court affirmed the assessment and an appeal was taken to the Supreme Court of Mississippi, which court affirmed, holding that no independent investigation of the law and the facts could be had in the state courts on certiorari. State statutes deny injunctive relief. R. 12. Petitioner shows by sworn bill of complaint, admitted by Motion to Dismiss, that he never had a trial on the merits of his cause in the state courts; that he is without a plain, speedy and efficient remedy in the courts of Mississippi, at law or in equity; that the orders of respondents against petitioner were not made after reasonable notice and hearing. R. 49, 50. Petitioner shows by sworn bill of complaint, admitted

by motion to dismiss, that he was proceeded against without evidence. R. 51. He shows that he was proceeded against without jurisdiction, and contrary to the statutes of the State of Mississippi, and in violation of his state and federal constitutional rights, R. 51, 52, because petitioner was not afforded the hearing provided by the statutes of the state, but arbitrarily, without adequate hearing, and without a report in writing setting forth a review of the cause and the essential facts of the matter, and there was nothing before the whole commission on petitioner's final administrative appeal to state officers, and nothing before the courts of Mississippi, on certiorari. Petitioner shows that he cannot pay the tax, he does not have the money, and he cannot recover any interest on any taxes he might pay the state by levy on, and sale of, his property.

V

Specification of Assigned Errors to Be Argued

A

The District Court of the United States erred in dismissing petitioner's Bill for Injunction, and the order of the District Court conflicts with prior Federal and State court decisions.

1. The motion to dismiss admits the allegations of fact contained in the sworn bill of complaint.

2. Unless plaintiff has an adequate remedy at law, the District Court had jurisdiction to restrain the collection of the taxes mentioned in the sworn bill of complaint filed therein.

3. Unless the remedy afforded at law in the Courts of the State of Mississippi is plain, speedy and efficient, plaintiff has no adequate remedy at law.

4. Unless interest can be collected on the taxes assessed against plaintiff, he does not have an adequate remedy at law in the Courts of Mississippi.

5. The Legislature of Mississippi alone can appropriate money to pay taxes unlawfully collected and the interest on said taxes.

6. No interest can be collected in the Courts of Mississippi on taxes erroneously paid or unlawfully collected without statutory authority.

7. Where a state statute provides that interest may be recovered without stipulating the rate of interest, no interest can be collected.

8. For estoppel of judgment to apply, or a judgment to be res judicata, the merits of the cause must be inquired into and decided.

9. The doctrine of the law of the case only applies where the facts are identical, the cause is between the same parties, full opportunity is afforded litigants to develop their case, and judgment is rendered on the merits of the cause.

10. Where the Supreme Court of the United States declines jurisdiction and dismisses an appeal for want of jurisdiction, or fails to grant certiorari, no right is lost by litigants to proceed further in state or federal courts.

B

The Circuit Court of Appeals for the Fifth Circuit erred in affirming the action of the District Court and holding that petitioner's remedy was to pay the state tax and sue in the District Court of the United States for its recovery.

1. The decision of the Circuit Court of Appeals for the Fifth Circuit is in conflict with decisions of other Circuit Courts of Appeals of the United States on the same subject.

2. Conflict with the 11th Amendment to the Constitution of the United States and decisions of the Supreme Court of the United States.

Brief of Argument

The Bill charges and the motion admits, that Plaintiff does not owe the tax, or any part of the additional assessments; that Plaintiff did not have reasonable notice and hearing; that the Orders made against him were rendered without evidence, and contrary to the indisputable character of the evidence offered by taxpayer, appellant, and no finding of fact was made as required by State statutes of Mississippi.

An interlocutory injunction is sought.

Such injunction will result in suspending or restraining the enforcement, operation, or execution of a statute of the State of Mississippi and the Order of an Administrative Board or Commission acting under or pursuant to such State statutes.

The ground upon which the interlocutory injunction is asked is the unconstitutionality of the statutes and the unconstitutionality of the Order.

Plaintiff seeks by Complaint to restrain, by such interlocutory injunction, the action of an officer of the State of Mississippi.

Plaintiff has no adequate remedy in the State courts; he cannot pay the tax, he does not have the money; he cannot recover interest on any taxes he may pay the State; the Legislature of Mississippi has never appropriated money to pay interest on taxes unlawfully or erroneously collected, and has never appropriated money to pay taxes unlawfully collected.

The Motion to Dismiss admits the allegations of fact of the sworn Bill of Complaint filed by taxpayer, appellant, herein.

Because appellant is unable to pay the tax, he does not have the money, and because he cannot recover interest on any taxes he might pay, he does not have an adequate remedy in the State Court.

The decisions in the state court proceedings are not *res judicata* because the court said it could not, and would not, pass on the merits of the case.

No complete judicial review is available to taxpayer in the courts of Mississippi.

ARGUMENT AND AUTHORITIES

Conflict With Prior Federal and State Court Decisions

A

I

The Motion to dismiss admits the allegations of fact contained in the sworn Bill of Complaint

Southern Ry. Co. v. *Query, et al.*, 21 F. (2d) 333.

In *Okla. Utility Co.* v. *City of Harmoney*, 2 F. Supp. 849, the court held that in determining jurisdiction of Federal trial court, allegations in Bill of Complaint must be accepted as true on motion to dismiss the bill.

The sworn Bill of Complaint alleges that the orders rendered by defendants against him were rendered without reasonable notice and hearing, and in an unconstitutional and illegal manner, and that the statutes of the State of Mississippi, as construed and applied against him are unconstitutional, null and void and violate the 14th Amendment to the Federal Constitution and Section 14 of the Constitution of Mississippi. The sworn Bill of Complaint shows that the plaintiff does not have an adequate remedy in the State Courts; that he cannot have a judicial as contradistinguished from an administrative hearing. The Bill

shows that no appeal is allowed by State law, the statute denies injunctive relief, and the state court, in a certiorari proceeding commenced by plaintiff as the final step in the administrative process, held that the facts of the case could not and would not be considered, on certiorari, and therefore the merits of the cause cannot be examined by State courts. The motion to dismiss admits all of the allegations of fact.

II

Unless plaintiff has an adequate remedy at law, the District Court had jurisdiction to restrain the collection of the taxes mentioned in the sworn Bill of Complaint filed therein.

Section 266, *Judicial Code*, Section 380, 28 U. S. C. A., Section 41, Title 28, U. S. C. A.;
Cary v. *Corporation Commission of Oklahoma*, 9 F. Supp. 709, 296 U. S. 452;
Southern Railway Co. v. *Query, et al.*, 21 F. (2d) 333;
Mississippi Power Co. v. *City of Aberdeen*, 9 F. Supp. 564;
Phipp v. *School District of Pittsburg*, 111 F. (2d) 392;
Printers and Publishers Corporation v. *Cochett*, 25 F. Supp. 369.

In *Matthews* v. *Rogers*, 284 U. S. 528, the Court, through Mr. Justice Stone, now Chief Justice Stone, said:

> "Such a suit, although against the collecting officer rather than the state or municipality, affords an adequate legal remedy, in the absence of allegations in the bill, which are wanting here, of special circumstances showing inability of the taxpayer to pay the tax or of the collecting officer to respond to the judgment. See Arkansas Building & Loan Association v. Madden, supra, 175 U. S. 274, 20 S. Ct. 119, 44 L. Ed. 159; Atchison Topeka & Santa Fe Ry. v. O'Connor,

supra, 223 U. S. 285, 32 S. Ct. 216, 56 L. Ed. 436, Ann. Cas. 1913C, 1050; Singer Sewing Machine Co. v. Benedict, supra, 229 U. S. 487, 33 S. Ct. 942, 57 L. Ed. 1288; and is the rule in Mississippi: Coulson v. Harris, supra, 43 Miss. 752; Richardson v. Scott, 47 Miss. 236."

Coulson v. *Harris* and *Richardson* v. *Scott,* two Mississippi cases cited by the learned Chief Justice, in his opinion in the *Matthews* v. *Rogers* case, supra, are no longer the law in Mississippi. Furthermore, taxpayer alleged in his sworn Bill of Complaint filed herein that he was unable to pay the tax; that he did not have the money. If he had the money and could pay the tax, he could not recover it back with interest. The Supreme Court of Mississippi has definitely settled the fact that no interest can be collected on the taxes imposed by the sales tax statutes of Mississippi, particularly, in the cases of *Gulf M. & O. R. Co.* v. *Webster County,* — Miss. —, 18 So. (2d) 644, and *Moore* v. *Tunica County,* 143 Miss. 839.

In *Great Lakes Dredge and Dock Co.* v. *Huffman,* 319 U. S. 293, the Supreme Court of the United States, citing the *Matthews* v. *Rogers* case, denied relief to the taxpayers, because the Legislature of Louisiana not only provided for the recovery of interest on the taxes imposed by the statutes challenged by the taxpayer, but fixed the rate of interest, and provided that the disputed tax payments should be segregated pending decision in suits filed to recover said tax.

Taxpayer, Eddie J. Viator, not being able to pay the tax in dispute in this cause, because he does not have the money, and being unable to recover interest on any taxes he might pay under protest, is without adequate remedy in the state courts of Mississippi, and there is no law to the contrary, state or federal.

In *Cary* v. *Corporation Commission of Oklahoma,* 9 F. Supp. 709, affirmed in a *per curiam* opinion in *Corporation*

Commission of Oklahoma v. *Cary*, 296 U. S. 452, 56 S. Ct. 300, the Court, through McDermott, Circuit Judge, said:

> "This is a test case to determine whether the courts of the United States have jurisdiction over orders of the Corporation Commission of Oklahoma affecting rates charged by a public utility, since the passage of the Johnson Act of May 14, 1934 (Jud. Code, Sec. 24, 28 U. S. C. A. Sec. 41 (1), (1a); that is to say, may a 'plain' remedy be had in the courts of such state? The answer depends, as we see it, upon whether such orders may be judicially reviewed in the courts of Oklahoma in the face of the provision of the state constitution hereafter referred to."

The court said:

> "Plaintiff's contention is that the constitution, as construed by the later cases, denies a judicial review in the courts of the state. Defendants argue to the contrary; and also argue that the constitutional review by the supreme court is judicial if it affirms the order, and legislative if it modifies it; and that a legislative review by a court fulfills the requirements of due process.
>
> "We take up the two latter contentions first, since they involve federal questions. We cannot agree that a legislative review is all that is required by the federal constitution, for two reasons. * * * We conclude, therefore, that until the supreme court of Oklahoma determines that the laws of the state afford a judicial review in some state court of an order of the Corporation Commission affecting rates chargeable by a public utility, this court is not deprived of jurisdiction by the Johnson Act. * * *"

The Supreme Court of Mississippi has definitely and positively shown, in the case against appellant, taxpayer, that the Order of the State Tax Commission of Mississippi complained of herein, cannot be judicially reviewed in the state court. Judicial review by certiorari, in the state court,

does not under the state practice embrace independent consideration by the reviewing court of any question of fact determined by the commission, notwithstanding that a claim of constitutional right is asserted. Judicial review is similarly limited in an equity suit in the state court to restrain enforcement of the commission order. When appellant attempted to enjoin the commission order in an equity suit, the state court sustained demurrer and held that the decision in the certiorari proceeding was the law of the case.

In *Mississippi Power Company* v. *City of Aberdeen*, 9 F. Supp. 564, the court held that the "Reasonable Notice and Hearing" referred to in provisions of Section 41(1), 28 U. S. C. A., depriving Federal District courts of jurisdiction of intrastate rate cases, wherein order was made after reasonable notice and hearing, was guaranteed by law, and was not such notice and hearing as might be given by grace or caprice.

In *Phipp* v. *School District of Pittsburg*, 111 F. (2d) 392, affirming 26 F. Supp. 811, the court said that the adequacy of state court remedy must be measured by right of plaintiff to hearing on merits of his complaint.

In *Corporation Commission of Oklahoma* v. *Cary*, 56 S. Ct. 300, 296 U. S. 452, 80 L. Ed. 324, affirming *Cary* v. *Corporation Commission of Oklahoma*, 9 F. Supp. 709, the court held that Order of 3-Judge Federal District Court granting interlocutory injunction, restraining enforcement of order of Oklahoma Corporation Commission, reducing gas rates, was within court's jurisdiction and not an improvident exercise of judicial discretion, in view of uncertainty in State Supreme Court's decisions as to judicial remedy in State court.

In *Gramling* v. *Maxwell*, 52 F. (2d) 260, because the question was presented as to the inability of the taxpayer to pay the tax, the court sustained jurisdiction and granted interlocutory injunction.

In *Piedmont & N. Ry. Co.* v. *Query,* 56 F. (2d) 173, the court held that jurisdiction of the federal court extended to every question involved, whether of state or federal law, even though the court may not find it necessary to decide the federal question, citing *Greene* v. *L. & I. R. Co.,* 244 U. S. 799, *Davis* v. *Wallace,* 257 U. S. 478, 482, and *Atlantic Coast Line R. Co.* v. *Doughton,* 262 U. S. 413, 416.

In *Nutt* v. *Ellerbee, et al.,* 56 F. (2d) 1058, 1062, the court held that remedy which does not provide for reasonable interest on tax wrongfully collected is not complete or adequate remedy preventing injunction.

In the *Nutt* v. *Ellerbee* case, *supra,* the Court said:

> "But there is another reason why the remedy provided by sections 511 and 512 of the Code of 1922 is inadequate. Those sections provide merely for the recovery of the amount of the tax, and no interest. Whatever may be said as to those views which were entertained in remote times respecting interest, considering such exactions in all cases usurious or illegal, if not positively sinful, yet in modern times such archaic notions have long since been abandoned. Money is now a proper subject of hire, and the habits and customs of the people and modern law all concur in recognizing that interest is a proper means of compensation for the use of money lent or wrongfully detained. A remedy which does not provide for a reasonable amount of interest is not a complete or adequate remedy. Southern Railway Co. v. Query, 21 F. (2d) 333, 342."

III

Unless the remedy afforded at law in the Courts of the State of Mississippi is plain, speedy and efficient, plaintiff has no adequate remedy at law.

Atlantic C. L. R. Co. v. *Doughton*, 262 U. S. 413.
Union Pac. R. Co. v. *Board of Commissioners of Weld County*, 247 U. S. 282.
Davis v. *Wakelee*, 156 U. S. 680.
Dawson v. *Kentucky Distilleries*, 255 U. S. 286.
Southern Ry. Co. v. *Query*, 21 F. (2d) 333-337.
Okla. National Gas Co. v. *Russell*, 261 U. S. 290.

IV

Unless interest can be collected on the taxes assessed against plaintiff, he does not have an adequate remedy at law in the Courts of Mississippi.

Southern Ry. Co. v. *Query, et al.*, 21 F. (2d) 333.
Nutt v. *Ellerbee*, 56 F. (2d) 1058, 1062.

V

The Legislature of Mississippi alone can appropriate money to pay taxes unlawfully collected and the interest on said taxes.

Sec. 3276, Mississippi Code of 1930.
Sec. 63, Mississippi Constitution of 1890.
Sec. 64, Mississippi Constitution of 1890.
Sec. 69, Mississippi Constitution of 1890.
State v. *Cole*, 81 Miss. 174.
Colbert v. *State*, 86 Miss. 769.
Sec. 4292, Miss. Code of 1942.

VI

No interest can be collected in the Courts of Mississippi on taxes erroneously paid or unlawfullly collected without statutory authority.

Gulf, M. & O. R. Co. v. *Webster County,* 18 So. (2d) 644
Moore v. *Tunica County,* 143 Miss. 839.
City of Indianola v. *Cates,* 181 Miss. 145.

In the case of *Gulf M. & O. R. Co.* v. *Webster County, supra,* decided May 31, 1943, the court, through Chief Justice Smith, said:

> "No interest on the taxes paid by the appellant can be allowed as we have no statute so providing. Moore v. Tunica County, 143 Miss. 839, 108 So. 900, City of Indianola v. Cates, 181 Miss. 145, 179 So. 284."

In *Moore* v. *Tunica County, supra,* the Court, through Chief Justice Smith, said:

> "The legal rate of interest on all notes, accounts and contracts, shall be six per cent. per annum. As neither the state nor its political subdivisions are specifically mentioned in this statute, it does not apply to them under the decisions herein last referred to, and which were followed in the cases of Pearl River County v. Blodgett, 102 So. 5, and Yazoo City v. Taylor, 104 So. 111, recently decided in this court, but in which no written opinions were delivered. The motion will be overruled."

In the *Moore* v. *Tunica County, supra,* appellants sought to recover interest from the state without a statute fixing the rate and referred to the 6 per cent interest statute of Mississippi. The court refused recovery of interest and

held that the general statute providing for interest on notes, accounts and contracts, does not apply to municipal corporations or other political subdivisions of the state, since they are not specifically mentioned therein.

VII

Where a state statute provides that interest may be recovered without stipulating the rate of interest, no interest can be collected.

The Sales Tax Statute of Mississippi, Chapter 119, Laws of 1934, as amended by the Laws of 1936, and Chapter 113, Laws of 1938, provide only that any taxpayer who is required to pay the tax, may sue to recover it with interest in the Circuit Court of the County of his residence. No rate of interest is fixed, and the Supreme Court of Mississippi has put it beyond question that interest can not be collected. Taxpayer could not resort to the six per cent statute of Mississippi, under the decisions of the Supreme Court of Mississippi, particularly *Moore* v. *Tunica County* and *Gulf M. & O. R. Co.* v. *Webster County, supra.*

VIII

For estoppel of judgment to apply, or a judgment to be res judicata, the merits of the cause must be inquired into and decided.

> "A judgment cannot be set up in bar of a subsequent action unless it was a final judgment on the merits, adjudicating the rights in litigation in a conclusive and definite manner."
>
> 34 C. J., Section 1186, pages 770-1, citing:
> *G. & C. Merriam Co.* v. *Saalfield*, 241 U. S. 22;
> *McGourkey* v. *Toledo, etc., R. Co.*, 146 U. S. 536;
> *Hickey* v. *Stewart*, 2 How. 750;

Spencer v. *Watkins*, 94 C. C. A. 659 (Cert. denied 215 U. S. 605);
Australian Knitting Co. v. *Gormly*, 138 F. 92;
O'Brien v. *Wheelock*, 78 F. 672;
Hurst v. *Everett*, 21 F. 218;
Whitaker v. *Branson*, 29 F. Cas. No. 17,526, 2 Paine 209; and many State Court cases.

"Unless the proceedings and judgment in a case involved or afforded full legal opportunity for an investigation and determination of the merits of the suit, the judgment therein will not operate as a bar to a subsequent suit upon the same cause of action, or in subsequent proceedings in the same case."

34 C. J., Section 1193, pages 774-5, citing:
Gould v. *Evansville, etc., R. Co.*, 91 U. S. 526;
Hughes v. *U. S.*, 4 Wall. 232;
Nichols v. *Cleveland*, 247 Fed. 731, 159 C. C. A. 589 (Cert. denied 246 U. S. 668); and many State and Federal cases too numerous to mention.

"A judgment is on the merits when it amounts to a decision as to the respective rights and liabilities of the parties, based on the ultimate fact or state of facts disclosed by the pleadings or evidence, or both, and upon which the right of recovery depends, irrespective of formal, technical, or dilitary objections or contentions. If the case is brought to an issue, heard upon evidence submitted pro and con, and decided by the verdict of a jury or the findings of a court, the judgment rendered is upon the merits. But it is not necessary that there should have been a trial. If the judgment is general, and not based on any technical defect or objection, and the parties had a full legal opportunity to be heard on their respective claims and contentions, it is upon the merits, although there was no actual hearing or argument on the facts of the case; and it is immaterial what the judgment is called or how it is framed, if it really involved a consideration and determination of the merits. Nor is a judg-

ment the less conclusive because the matter settled thereby was improperly pleaded, if no objection was made at the time."

34 C. J., Section 1194, pages 775, et seq., citing:
Fourniquet v. *Perkins*, 7 How. 160, 12 L. Ed. 650, and many State Cases.
Leung Jun v. *U. S.*, 171 Fed. 413, 96 C. C. A. 369.

"A judgment is not on the merits if the case went off on any preliminary, subsidiary, or technical plea or objection. Accordingly a judgment for defendant on the ground that the court is without jurisdiction, or for defects in parties or pleadings, or because plaintiff has misconceived his remedy, or has brought his action prematurely, is not a bar to a subsequent action. So a judgment denying recovery to plaintiff because of want of capacity to sue is not a bar to another action after the incapacity is removed, although the question was determined after a trial on the merits."

34 C. J., Section 1194, pages 776, 777, citing:
Brooklyn Heights R. Co. v. *Straus*, 245 F. 132;
Hughes v. *U. S.*, 4 Wall 232, 18 L. Ed. 303;
Brown v. *Fletcher*, 182 F. 963, 105 C. C. A. 425, (Cert. denied 220 U. S. 611).

"A judgment is not conclusion on any point or question which from the nature of the case, the form of action, or the character of the pleadings could not have been adjudicated in the suit in which it was rendered; nor, the action having been at law, of a claim or defense which would be cognizable only in equity; nor as to any matter which must necessarily have been excluded from consideration in the case as being beyond the jurisdiction of the particular court."

34 *C. J., Section* 1339, *pages* 935-936, *citing*: *U. S.* v. *Ash Sheep Co.*, 250 F. 572, 162 C. C. A. 588 (Writ of Cert. denied 248 U. S. 561), and many State and Federal cases.

Appellant, taxpayer, did not have a decision on the merits of his cause. The Supreme Court of Mississippi, in *Viator v. State Tax Commission of Mississippi*, 193 Miss. 266, 5 So. (2d) 487, positively stated that the merits of his contentions could not, and would not, be examined and decided. The court said that the question whether there was evidence before the State Tax Commission of Mississippi was not before the Court below and not before the Supreme Court of Mississippi, because on certiorari, the Court could and would only consider errors of law. The court then went on to say that taxpayer was given an opportunity to overcome by evidence the facts upon which the two additional sales tax assessments were based. However, the decision of the Court must be interpreted in the light of the opinion by the Court, in solemn words, that the question of evidence, or lack of evidence, was not before the court on certiorari proceeding. The court, in effect, said that appellant had misconceived his remedy; that certiorari was not a proper remedy; that he could not complain of the lack of evidence to sustain the tax assessments made against him.

In *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U. S. 293, 63 Sup. Ct. 1071, the Court, through Mr. Chief Justice Stone said:

> "After a trial the district court held the statute applicable to petitioners and their employees and, as applied to them, a valid exercise of state power. 43 F. Supp. 981. The formal judgment ordered dismissal of the suit, but it is to be interpreted in the light of the court's opinion, findings, and conclusions of law. Metropolitan Water Co. v. Kaw Valley Drainage Dist., 223 U. S. 519, 523, 32 S. Ct. 246, 247, 56 L. Ed. 533; Gulf Refining Co. v. United States, 269 U. S. 125, 135, 46 S. Ct. 52, 53, 70 L. Ed. 195; Clark v. Williard, 292 U. S. 112, 118, 54 S. Ct. 615, 617, 78 L. Ed. 1160; American Propeller & Mfg. Co. v. United States, 300 U. S. 475, 479, 480, 57 S. Ct. 521, 523, 81 L. Ed. 751. So in-

terpreted it rests wholly on the court's declaration that the statute applied to petitioners is constitutional; it is thus in effect a declaratory judgment."

The formal judgment of the Supreme Court of Mississippi affirmed the additional sales tax assessments made against appellant, but it is to be interpreted in the light of the court's opinion, findings, and conclusions of law. So interpreted it rests wholly on the court's declaration that the merits of the cause were not passed on; that Orders of the administrative tribunal, rendered without evidence, could not be tested in the State court, as the final step in the administrative process. The Motion to Dismiss admitting the lack of evidence to sustain the administrative order, and that such Order was contrary to the indisputable character of the evidence offered by appellant, it now remains to be seen if appellant has an adequate remedy in the State court, for, unless appellant has an adequate remedy in the State Court, he has the unquestioned right, under Section 266 of the Judicial Code, and Section 41, 28 U. S. C. A., to enjoin the enforcement of such order and the further action against him by State officers, in the Courts of the United States.

Boyd v. *State of Alabama*, 94 U. S. 645.
Dennison v. *United States*, 168 U. S. 241.
Richardson v. *City of Boston*, 60 U. S. 263.
Bohler v. *Callaway*, 267 U. S. 479.

The Supreme Court of Mississippi, in *Viator* v. *State Tax Commission, et al.*, 193 Miss. 266, 5 So. (2d) 488, failed and refused to pass on the merits of taxpayer's contentions and said:

"Another of the appellant's complaints is that 'there is no presumption in favor of the validity of an order unless there is evidence to support such order.' The order referred to is that made by the Tax

> Commission approving this assessment. Whether this order of the State Tax Commission is supported by evidence was not before the court below, and is not before us here, for the reason that under Sections 72 and 73, Code 1930, the court to which a case has been removed by a writ of certiorari is confined to the examination of questions of law arising or appearing on the face of the record and proceedings."

The Supreme Court of the United States has many times held that the charge of lack of evidence to support administrative order is a question of law for the courts to decide. The proceeding by certiorari to review and test the legality of additional sales tax assessments against taxpayer in this cause, was but the final step in the administrative process. If taxpayer had not resorted to certiorari under Sections 72 and 73 of the Mississipi Code of 1930, defendants, appellees, would have definitely contended that taxpayer had not exhausted his administrative remedy and could not be heard to complain in the Federal courts. The Supreme Court of the United States has repeatedly held that unless a litigant exhausts his administrative remedies, he cannot enjoin the action of state officers in Federal courts.

In *Morgan* v. *United States*, 304 U. S. 1, 21, 22, the Court held that requisites of a fair hearing are that the course of proceeding shall be appropriate to the case and just to the party affected; that he may have time and opportunity, after all the evidence against him is produced and known to him, to produce evidence and witnesses to refute it.

In *U. S.* v. *Abilene & Southern Ry.*, 265 U. S. 274; and *West Ohio Gas Co.* v. *Public Utilities Comm. of Ohio*, 294 U. S. 63, the Court held that nothing can be treated as evidence which is not introduced as such, and a finding without evidence is beyond the power of the commissioner, and violates the Fourteenth Amendment to the Constitution of the United States.

In *Atchison, T. & S. R. Co.* v. *United States,* 295 U. S. 193, 201, 202, the Court held that orders of a quasi-judicial commission must be based on evidence.

In *The Chicago Junction case,* 264 U. S. 258; *Peoria & P. U. R. Co.* v. *United States,* 263 U. S. 528; *I. C. C.* v. *Louisville & N. R. R. Co.,* 227 U. S. 88, and *Lehigh Valley R. Company* v. *United States,* 243 U. S. 412, the Court held that Orders of administrative tribunals, quasi-legislative and quasi-judicial, must be supported by evidence.

In *Florida E. C. R. Co.* v. *United States,* 234 U. S. 167, the Court held that refusal to consider the evidence which was introduced or properly offered for introduction, or to make a material finding without evidence, is arbitrary action, and an order so made must be reviewed by the Courts.

On appeal in an equity cause, the state court held the decision of the first appeal case was the law of the case and *res judicata.* In the first appeal case, entitled *Viator* v. *State Tax Commission of Mississippi, et al.,* 193 Miss. 266, 5 So. (2d) 487, the state court held it could not consider the question of lack of evidence to sustain the administrative order, because on certiorari it could only examine errors of law arising or appearing on the face of the record.

When taxpayer again complained of the failure of the defendants to introduce evidence to support their orders against him, by Bill of Complaint in the State court to enjoin the execution of said orders, and the judgment of the Circuit Court of Hinds County in certiorari proceeding affirmed by the State Supreme Court, the Supreme Court of Mississippi held that the judgment in the certiorari cause was conclusive and the law of the case. Nevertheless, the opinion of the state court affirming the orders of defendants show on their face that the merits of the cause were not passed on. It is further shown that the

defendants proceeded against taxpayer without evidence, contrary to the indisputable character of evidence offered by him, and without a report in writing setting forth a review of the cause and the essential facts of the matter, all of which are necessary to due process of law. Appellant was denied a hearing in a constitutional sense. He was never afforded an opportunity to know the state of case against him and he was not accorded the privilege and opportunity of cross-examining witnesses against him. On the contrary, defendants failed and refused to comply with the statutes involved, said they would not investigate the matter fully, or at all, would not introduce evidence, and would make no report in writing setting forth a review of the cause and the essential facts of the matter.

In Phipp v. *School District of Pittsburg*, 111 F. (2d) 393, affirming 26 F. Supp. 811, the court held that the efficiency of remedy in a state court against enforcement of invalid tax, as precluding action for injunction in federal court, is not to be measured by the limitations upon relief allowable to a particular complainant who has been guilty of laches, but the test is whether state courts jurisdiction is competent for a hearing of the complaint on its merits.

IX

The doctrine of the law of the case only applies where the facts are identical, the cause is between the same parties, full opportunity is afforded litigants to develop their case, and judgment is rendered on the merits of the cause.

The law of the case doctrine cannot apply in this cause for the reason that the course of Mississippi failed and refused to consider the question of constitutional right. The court sanctioned the arbitrary exercise of power by defendants against taxpayer, in proceeding against him

without evidence and contrary to the evidence offered by him, by permitting defendants to make the additional assesments against plaintiff by comparing the business of taxpayer with other retail merchants, and purposely high to take care of whatever the Field Representatives might be able to find. The State court, as the final step in the administrative process, affirmed the assessments without evidence and without requiring defendants to give taxpayer reasonable notice and hearing required by the law and without a finding of basic fact, showing not only jurisdiction of the defendants over taxpayer, but factual basis for the additional sales tax assessments. The state court said it could not, and would not, consider the question of evidence and taxpayer's complaint of lack of evidence.

X

Where the Supreme Court of the United States declines jurisdiction and dismisses an appeal for want of jurisdiction, or fails to grant certiorari, no right is lost by litigants to proceed further in state or federal courts.

The law is well settled that an appeal from a final judgment of the State Supreme Court to the Supreme Court of the United States is not an adequate remedy so as to defeat the jurisdiction of the District Courts of the United States to enjoin and restrain the collection of State Taxes.

Chicago, etc., R. Co. v. *Railroad, etc., Comm.*, 280 F. 387.

To say that because the Supreme Court of the United States declined jurisdiction and dismissed taxpayer's appeal, appellant could not main bill for interlocutory injunction and temporary restraining order in the District

Court of the United States, is to overthrow the weight of authority of decisions of federal courts and state courts, and, in the opinion of the writer, needs no authority to refute it. Where a court says it has no jurisdiction and dismisses the cause without making an adjudication of the facts and deciding the cause on its merits, unquestionably, litigants have the right to go further and get into a proper court. If this was not the rule, citizens would invoke the jurisdiction of courts at their peril. They would be penalized for invoking the wrong jurisdiction, and their cause would never be decided on the merits.

House v. *Mayo*, 65 S. Ct. 521, from which we quote:

"The District Court also referred to a denial by this Court of a petition for certiorari, filed here after the denial by the Florida Supreme Court of one of the applications for habeas corpus. See *House* v. *Mayo*, 322 U. S. 710, 64 S. Ct. 1058. The district court thought that this was an expression 'of the opinion that no meritorious question is presented by the matters of which petitioner here complains.' But as we have often said, a denial of certiorari by this Court imports no expression of opinion upon the merits of a case. See *Hamilton-Brown Shoe Co.* v. *Wolf Brothers*, 240 U. S. 251, 258, 36 S. Ct. 269, 271, 60 L. Ed. 629; *State of Ohio ex rel. Seney* v. *Swift & Co.*, 260 U. S. 146, 151, 43 S. Ct. 22, 24, 67 L. Ed. 176; *United States* v. *Carver*, 260 U. S. 482, 490, 43 S. Ct. 181, 182, 67 L. Ed. 361; *Atlantic Coast Line R. Co.* v. *Powe*, 283 U. S. 401, 403, 404, 51 S. Ct. 498, 499, 75 L. Ed. 1142."

B

1. Conflict with the 11th Amendment to the Constitution of the United States and Decisions of the Supreme Court of the United States.

Ford Motor Company v. *Department of Treasury, etc.*, 65 S. Ct. 350-51, from which we quote:

"This express constitutional limitation denies to the federal courts authority to entertain a suit brought by private parties against a state without its consent. *Hans* v. *State of Louisiana*, 134 U. S. 1, 10, 10 S. Ct. 504, 505, 33 L. Ed. 842; *Ex parte State of New York*, 256 U. S. 490, 497, 41 S. Ct. 588, 589, 65 L. Ed. 1057; *State of Missouri* v. *Fiske*, 290 U. S. 18, 25, 54 S. Ct. 18, 20, 78 L. Ed. 145; *United States* v. *United States Fidelity & Guaranty Co.* 309 U. S. 506, 512, 60 S. Ct. 653, 656, 84 L. Ed. 894; *Great Northern Life Insurance Co.* v. *Read, supra; State* v. *Mutual Life Ins. Co.*, 175 Ind. 59, 71, 93 S. E. 213, 42 L. R. A., N. S., 256; *Hogston* v. *Bell*, 185 Ind. 536, 548, 112 N. E. 883. While the state's immunity from suit may be waived, *Clark* v. *Barnard*, 108 U. S. 436, 447, 2 S. Ct. 878, 27 L. Ed. 780; *Gunter* v. *Atlantic Coast Line*, 200 U. S. 273, 26 S. Ct. 252, 50 L. Ed. 477; *State of Missouri* v. *Fiske*, 290 U. S. 18, 24, 54 S. Ct. 18, 78 L. Ed. 145, there is nothing to indicate authorization of such waiver by Indiana in the present proceeding."

The State of Mississippi has not consented to be sued in the Federal Court. On the contrary, the sales tax statutes of Mississippi provide that any taxpayer required to pay the tax may file suit for its recovery in the Circuit Court of the County of his residence. The provisions of the Mississippi Statutes are identical with the provisions of the Indiana Statutes in the *Ford Motor Co.* case, supra.

2. Conflict with Decisions of Other Circuit Courts of Appeals

In *Phipp* v. *School District of Pittsburg*, 111 F. (2d) 392, affirming 36 F. Sup. 811, the court said that the adequacy of state court remedy must be measured by right of plaintiff to hearing on merits of his complaint.

In the case against Petitioner, the state court refused him a hearing on the merits of his complaint, holding that the court could not consider the evidence or lack of evidence to sustain the administrative order.

In *Gramling* v. *Maxwell*, 52 F. (2d) 260, because the question was presented as to the inability of the taxpayer to pay the tax, the court sustained jurisdiction and granted interlocutory injunction.

In *Piedmont & N. Ry. Co.* v. *Query*, 56 F. (2d) 173, the court held that jurisdiction of the federal court extended to every question involved, whether of state or federal law, even though the court may not find it necessary to decide the federal question.

In *Nutt* v. *Elerbee, et al.*, 56 F. (2d) 1058, 1062, the court held that remedy which does not provide for reasonable interest on tax wrongfully collected is not complete or adequate remedy preventing injunction.

In *Nutt* v. *Elerbee, et al.* supra, the court said:

> "But there is another reason why the remedy provided by sections 511 and 512 of the Code of 1922 is inadequate. Those sections provide merely for the recovery of the amount of the tax, and no interest. Whatever may be said as to those views which were entertained in remote times respecting interest, considering such exactions in all cases usurious or illegal, if not positively sinful, yet in modern times such archaic notions have long since been abandoned. Money is now a proper subject of hire, and the habits and customs of the people and modern law all concur in

recognizing that interest is a proper means of compensation for the use of money lent or wrongfully detained. A remedy which does not provide for a reasonable amount of interest is not a complete or adequate remedy. *Southern Railway Co.* v. *Query*, 21 F. (2d) 333, 342."

In *Warmsprings Irr. Dist.* v. *May*, 117 F. (2d) 802, the court held that in Oregon, where the circuit court, a court of general jurisdiction, took cognizance of reclamation proceedings pursuant to special statutory authority, it became an "inferior court" for that cause, and there was no presumption in favor of its jurisdiction, since the proceedings were in derogation of common law and record must affirmatively show jurisdiction.

In *Adams County* v. *Northern Pac. Ry. Co.*, 115 F. (2d) 768, the Court held that an action at law for refund of taxes after payment under protest, as provided by state statutes, is ordinarily an "adequate remedy" in case of an illegal or excessive tax and as such an effective bar to granting of equitable relief, but special circumstances may render the action for refund a remedy of doubtful efficiency, in which case federal equitable jurisdiction is not excluded.

In *Southern Ry. Co.* v. *Query*, 21 F. (2d) 333, the Court held that state law authorizing suit against state in state court to recover illegal taxes does not provide remedy at law defeating federal jurisdiction in equity.

Petitioner shows by sworn bill of complaint, admitted by Motion to Dismiss, that he cannot pay the additional sales tax assessed against him, because he does not have the money. He shows that he cannot recover interest on any taxes he might eventually pay by levy on, and sale of, his property. No rate is fixed by statute. It merely recites that any tax payer required to pay the taxes imposed by the act may sue to recover them in the circuit court of the

county of their residence, with interest. The State court holds that interest cannot be recovered where the rate is not fixed; that resort cannot be had to the general interest statute of Mississippi, providing for the payment of six per cent on notes, accounts, et cetera, for the reason that the State and its political subdivisions are not mentioned in such general interest statute. Petitioner therefor cannot recover interest.

Summary and Conclusion

It is respectfully submitted that the preceding argument fully supports, and indeed requires, the following conclusion:

First: No complete judicial review is available to petitioner in the state court, and he does not have an adequate remedy at law or equity in the state court because of the denial of such complete judicial review and because he cannot pay the tax, he does not have the money, and he cannot recover interest on any taxes he might eventually pay through levy on or sale of his property.

Second: The decision of the Circuit Court of Appeals for the Fifth Circuit is contrary to decisions of other Circuit Courts of Appeals in that other courts hold that where a taxpayer is unable to pay state taxes, he is entitled to an injunction in the federal courts.

Third: Where taxpayer is unable to recover interest on any state taxes he might pay, he is entitled to enjoin the collection of taxes in the Federal courts.

Fourth: The challenged statutes as construed and applied against petitioner by state courts are unconstitutional, null and void.

Fifth: The decision of the Circuit Court of Appeals for the Fifth Circuit that taxpayer may pay the tax and sue in the District Court of the United States for its recovery, contravenes the 11th Amendment to the Constitution of the United States and decisions of the Supreme Court of the United States.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the opinion and judgment of the Circuit Court of Appeals for the Fifth Circuit may be reversed and this cause remanded for further proceedings not inconsistent with the opinions of this Honorable Court, and that the court below may be required to remand this cause to the District Court to convene a three-judge court and hear the complaint of petitioner on its merits.

Respectfully submitted,

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